

T.N., Appellant

**U.S. POSTAL SERVICE, MILWAUKEE
PRIORITY ANNEX POST OFFICE,
Oak Creek, WI, Employer**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

ALEC J. KOROMILAS, Chief Judge
 JANICE B. ASKIN, Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

On July 28, 2021 appellant filed a timely appeal from a February 11, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated February 13, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

² The Board notes that, following the February 11, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 22, 2016 appellant, then a 35-year-old parcel post distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed "Other Disorders Due to Repeated Trauma" due to factors of her federal employment, including daily walking and standing on concrete floors and lifting heavy bags with parcels and bundles. She reported that she first became aware of her claimed condition and realized its relation to her federal employment on December 26, 2015.

In support of her claim, appellant submitted a February 5, 2016 work excuse note from Dr. William Raasch, a Board-certified orthopedist specializing in sports medicine, who reported that appellant was able to return to full-time sedentary-duty work on February 9, 2016.

In a development letter dated March 4, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a March 23, 2016 letter, Dr. Raasch noted that he examined appellant on February 5, 2016 for right knee pain she had for the last several months. He referenced a January 26, 2016 magnetic resonance imaging (MRI) scan that showed a significant condylar injury involving the medial femoral condyle. Dr. Raasch related appellant's work history and opined that her patellofemoral symptoms were consistent with her work activities. He recommended physical therapy and sedentary-duty work pending re-evaluation.

On April 1, 2016 appellant responded to OWCP's development questionnaire, noting that she lifted heavy bags, pulled boxes, pulled all-purpose carts, and went up and down stairs for three hours each day, five days a week. She believed these employment activities contributed to her claimed condition. Appellant reported that she did not engage in any activities outside of her federal employment that could have caused her condition.

By decision dated May 2, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted factors of her federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant subsequently submitted a January 17, 2016 work excuse note from Annie Billstrom, a physician assistant, advising that appellant could return to work with restrictions. She also submitted a January 26, 2016 work excuse note from Dr. Stephen Malcom, a Board-certified internist, advising that appellant should be excused from work until January 29, 2016.

On May 31, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She submitted a May 25, 2016 letter from Dr. Raasch

who diagnosed progressive wear of the patellofemoral articulation and a delamination at the femoral condyle. Dr. Raasch opined that the progression of the articular wear was outside the norm and was consistent with the accepted factors of appellant's federal employment.

A January 17, 2016 emergency department note signed by Ms. Billstrom related that appellant was walking at work on December 26, 2015 and felt a pop in her right knee. Appellant reported that since the initial injury, the pain recurred intermittently most days with walking. A January 17, 2016 x-ray of appellant's right knee revealed mild patellofemoral degenerative joint disease, but no fracture or dislocation.³

A February 5, 2016 emergency department note co-signed by Dr. Brady McIntosh, a Board-certified physician, reported that appellant was in a car accident on that date. An examination revealed tenderness in the right ribs, decreased range of motion, swelling, and tenderness in the right elbow, cervical back, and thoracic back, and tenderness and bony tenderness in the lower right leg. X-ray scans of appellant's chest, cervical spine, thoracic spine, right elbow, and right tibia and fibula revealed no abnormalities.

Appellant submitted progress notes from Dr. Raasch, dated February 5, April 6, May 18, and July 20, 2016, in which he recommended physical therapy and work restrictions, with the possibility of future chondrocyte implantation or autologous chondrocyte harvest to treat appellant's ongoing symptoms. In a July 20, 2016 work restriction note, Dr. Raasch indicated that appellant was able to return to full-time sedentary-duty work.

In a September 14, 2016 progress note, Dr. Malcom noted that appellant continued to experience right knee pain from a known meniscal tear and chondral defect after completing physical therapy.

By decision dated November 22, 2016, OWCP's hearing representative affirmed the May 2, 2016 decision, as modified, finding that the evidence of record contained a medical diagnosis establishing the medical component of fact of injury. The claim remained denied, however, as the evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted factors of her federal employment.

Appellant subsequently submitted a January 25, 2017 progress note from Dr. Raasch, indicating that appellant's patellofemoral symptoms had improved with physical therapy, but she continued to experience right knee pain from her significant chondral delamination.

In a January 18, 2017 letter, Dr. Raasch explained that he had not previously discussed appellant's February 5, 2016 car accident or her diagnosed obesity because he did not consider either to be a significant contributing factor to her diagnosed conditions. He further opined that appellant's patellofemoral symptoms were caused by prolonged employment factors, such as

³ Appellant underwent an MRI scan of her right knee on January 26, 2016, which revealed minimal meniscal free edge blunting of the medial meniscal body and posterior horn, sprain of the proximal lateral collateral ligament, full-thickness cartilaginous defects of the weight-bearing surface of the medial femoral condyle, and full-thickness cartilaginous loss of the lateral patellar facet.

lifting and carrying bins and standing and walking on cement floors, resulting in progressive wear of the patellofemoral articulation and a delamination of the femoral condyle.

On February 8, 2017 appellant requested reconsideration.

In a September 14, 2016 letter, Dr. Raasch repeated appellant's history of injury and advised that appellant would be able to perform her employment duties without restrictions by March 15, 2017.

In a December 5, 2016 work restriction note, Dr. Raasch advised that appellant could return to work full time with sedentary-duty work restrictions. On January 17, 2017 he advised that appellant could return to work on March 8, 2017 full time with no restrictions for a trial of activity.

On February 20, 2017 Dr. Raasch indicated that appellant would undergo right knee arthroscopy chondroplasty with drilling on April 20, 2017. In a March 1, 2017 work restriction note, he noted that appellant could return to work full time with sedentary-duty work restrictions.

By decision dated June 16, 2017, OWCP denied modification of its November 22, 2016 decision.

Appellant subsequently submitted a June 29, 2017 work restriction note from Dr. Raasch who advised that she could return to full-time work with sedentary-duty work restrictions on July 7, 2017.

On September 19, 2017 appellant requested reconsideration. She submitted an August 30, 2017 letter from Dr. Raasch in which he explained that the MRI scan performed at the time of injury revealed a clear edge to the articular surface consistent with an acute injury and appellant's history of injury. Dr. Raasch ruled out appellant's obesity as a major contributing factor reporting that, there would be a gradual thinning of the articular cartilage over years, rather than the acute delamination with a squared articular edge revealed by the MRI scan. Finally, he ruled out the February 5, 2016 car crash as a contributing factor because both the MRI scan and appellant's initial evaluation were performed prior to that date.

By decision dated December 18, 2017, OWCP denied modification of its June 16, 2017 decision.

On April 11, 2018 appellant requested reconsideration. She submitted a March 7, 2018 letter from Dr. Raasch in which he opined that her injury clearly occurred at work because the January 26, 2016 MRI scan revealed acute injury to the chondral surface consistent with the accepted factors of her federal employment.

By decision dated November 21, 2018, OWCP denied modification of its May 2, 2016 decision because the evidence of record contained inconsistent accounts of appellant's injury.

On May 28, 2019 appellant, through then-counsel, requested reconsideration. In a May 15, 2019 letter, Dr. Raasch related that appellant's injury occurred while walking at work, when she felt a pop in her knee followed by sharp pain and discomfort.⁴

Appellant also submitted work restriction notes from Dr. Raasch dated December 12, 2018, February 27, May 1, May 21, and July 31, 2019 advising that appellant could return to work full time with sedentary-duty work restrictions.

By decision dated August 21, 2019, OWCP denied modification of its November 21, 2018 decision, noting that Dr. Raasch's May 15, 2018 report suggested a traumatic injury rather than an occupational disease.

On October 7, 2019 appellant requested reconsideration. In an October 2, 2019 report, Dr. F. Michael Saigh, a Board-certified physician specializing in family medicine, related appellant's history of injury and treatment and diagnosed right knee tear of the articular cartilage, chondromalacia patellae, and tear of medial meniscus.⁵

OWCP also received a September 26, 2019 work restriction note from Dr. Raasch advising that appellant could return to work full time with sedentary-duty work restrictions.

By decision dated November 1, 2019, OWCP denied modification of its August 21, 2019 decision, finding that Dr. Saigh's report was of limited probative value because it contained factual inaccuracies.

On November 15, 2019 appellant requested reconsideration. She submitted an undated letter from Dr. Saigh addressing the factual discrepancies in his October 2, 2019 report.⁶

In a January 6, 2020 work restriction note, Dr. Raasch advised that appellant could return to work full time with sedentary-duty work restrictions.

⁴ Dr. Raasch noted that the MRI scan of appellant's right knee showed loose bodies, which, along with the clear onset of symptoms, "clearly defines the time of injury." He reiterated that while appellant's weight predisposed her to such an injury, "the mechanism of injury was the compression of the articular surface under shear load while ambulating at work." Dr. Raasch attributed appellant's condition not "to a progressive problem over time but rather a single step in which the damage occurred."

⁵ Dr. Saigh explained that "[d]egenerative tears in the articular surfaces of the meniscus and cartilage most commonly occur in middle aged adults that are subject [to] repetitive stress which causes weakening of the [meniscal] and articular cartilage tissue. In [appellant]'s case, the repetitive maneuvering of large equipment, lifting, standing on concrete floors and going up and down stairs while working for the [employing establishment] caused the [diagnosed conditions] of the right knee. All of these diagnos[is] are documented and affirmed with advanced medical imaging and supplemental orthopedic evaluations -- again in my medical opinion with medical certainty, the patient[']s conditions listed above correlate directly with the history, evaluations and medical imaging performed in a timely manner.... [T]his injury is an occupational disease due to extensive microtrauma over the course of time."

⁶ Dr. Saigh reported that the employment incident on December 26, 2015 resulted from extensive microtrauma over time, causing degeneration of the chondral surface and meniscus. He noted that the "pop" added significant damage to appellant's conditions, but cautioned that "just because the patient sustained a pop does not deem this traumatic."

By decision dated February 13, 2020, OWCP denied modification of its November 1, 2019 decision.

On February 10, 2021 appellant requested reconsideration and asserted that her diagnosed right knee conditions were causally related to the accepted factors of her federal employment. She submitted a February 3, 2021 work restriction note from Dr. Raasch advising that she could return to work with permanent restrictions, including no kneeling, squatting, climbing, or heavy lifting, as well as no repetitive ascending and descending stairs and no prolonged walking. Appellant also submitted a letter accepting a modified job offer on February 16, 2020.

Appellant also submitted a February 26, 2020 work restriction note from Dr. Raasch, which advised that appellant could return to work full time on March 7, 2020 with restrictions.

By decision dated February 11, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation, at any time, on his or her own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

⁷ 5 U.S.C. § 8128(a); *see J.T.*, Docket No. 19-1829 (issued August 21, 2020); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.606(b)(3); *see J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECs). *Id.* at Chapter 2.1602.4b.

¹⁰ *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *see J.V.*, *supra* note 8; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In support of her reconsideration request, she argued that her diagnosed right knee conditions were causally related to the accepted factors of her federal employment. The Board finds that this argument does not show that OWCP erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹²

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). The underlying issue on reconsideration is whether appellant's diagnosed right knee conditions are causally related to the accepted factors of her federal employment. This is a medical issue which is addressed by relevant medical evidence not previously considered.¹³

With her request for reconsideration, appellant submitted February 3 and 26, 2021 work restriction notes from Dr. Raasch. However, Dr. Raasch's notes do not address causal relationship and are, therefore, irrelevant to the underlying issue in this case.¹⁴ The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ As such, appellant is not entitled to further review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁶

The Board, therefore, finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁷

¹² *Supra* note 11.

¹³ *Y.L.*, Docket No. 20-1025 (issued November 25, 2020).

¹⁴ *See id.*

¹⁵ *See T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000).

¹⁶ *Supra* note 11.

¹⁷ *See C.M.*, Docket No. 19-1610 (issued October 27, 2020); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).¹⁸

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ In so far as Dr. Saigh supports an occupational disease caused by appellant's employment duties over her years of employment, appellant may file an occupational disease claim.